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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

OSCAR M. ROWLAND,

Defendant and Appellant.

B169234

(Los Angeles County
Super. Ct. No. BA235584)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Mark V. Mooney, Judge. Reversed.

Lynette Gladd Moore, under appointment by the Court of Appeal, for
Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant
Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Ana
R. Duarte and Jonathan J. Kline, Deputy Attorneys General, for Plaintiff and
Respondent.

INTRODUCTION

This case arises out of a confrontation between, on the one hand, an alleged
drug dealer, and, on the other hand, defendant Oscar M. Rowland and Michael

Battle. Defendant and Battle were jointly charged with robbery, burglary, assault, and car burglary. Battle pled nolo contendere to one count of robbery and was sentenced to a three-year term. Defendant went to trial and was convicted of all four counts although the jury found “not true” the allegations that he personally used a deadly and dangerous weapon and personally inflicted great bodily injury on the victim. The court sentenced defendant to a 17-year term.

Defendant’s defense, supported by his trial testimony, was that he was an innocent bystander and that all crimes were committed by Battle. To further support that defense, he used the declaration against interest exception to the hearsay rule (Evid. Code, § 1230)¹ to introduce Battle’s out-of-court statements made to a police officer on the day of the crimes in which Battle admitted he (Battle) had committed the crimes. However, over defense objection, the court redacted statements in which Battle had affirmatively said defendant had not committed any of the crimes. The court held those statements were not against Battle’s penal interests and therefore did not fall within the hearsay exception. Defendant’s primary appellate contention attacks that evidentiary ruling.

We conclude the trial court’s ruling was an abuse of discretion. Given the particulars of the crimes and Battle’s interview with the police officer, the redacted statements exonerating defendant were also incriminatory of Battle. The hearsay exception therefore applied. We also conclude the trial court’s ruling resulted in a miscarriage of justice. The statements corroborated defendant’s defense of non-involvement. Had they been admitted, it is reasonably probable a result more favorable to defendant would have occurred. We therefore reverse to permit a retrial.

¹ All subsequent undesignated statutory references are to the Evidence Code.

FACTUAL AND PROCEDURAL BACKGROUND

The Prosecution's Case-in-Chief

The prosecution's primary witness was Ernesto Esquivel, the victim of the crimes. He testified that on August 20, 2002, he and a female friend were staying at a room in a Hollywood motel. He responded to a knock on the door by slightly opening the door. Defendant and Michael Battle pushed through the door and entered the room. Defendant hit him on the head with a heavy object, causing profuse bleeding. Defendant asked him for money and drugs. The victim said he had neither. Defendant then hit him on the head at least three more times.

Battle searched the room and took, among other things, the victim's car keys. Defendant and Battle left after defendant had hit the victim one more time on the head. The victim called 911 as he heard his car alarm go off.

Joshua Davidson, another guest in the motel, saw two men rifling through a car and then run down the street. Davidson, however, was not able to identify defendant as one of the men.

The police arrived and interviewed the victim. He gave them descriptions of the two assailants. Two hours later, the police arrested defendant and Battle. The two matched the victim's descriptions. Each had blood on his clothes. Battle had some of the victim's property on his person. The victim identified defendant as the man who had struck him and Battle as the other man who had entered his room.

The Defense Case

Outside the presence of the jury, the defense called Battle as a witness. Battle asserted the privilege against self-incrimination. The court held Battle was unavailable within the meaning of section 240. The defense called Los Angeles Police Detective David Friedrich to testify to an interview he had with Battle about the crimes. The interview was conducted shortly after Battle and defendant had been arrested on August 20, 2002. The court found a portion of Battle's statements

qualified as a declaration against interest and permitted the detective to testify before the jury to the following.

Battle explained to the detective that he had gone to the victim's motel room to buy rock cocaine. He gave the victim \$20 but the victim only gave him \$10 worth of drugs. Battle asked the victim for \$10 in return and the victim refused. A physical altercation occurred because Battle believed the victim was going to attack him. Battle then stole the victim's car keys, entered the victim's the car, and took several items.

Over the objection of defense counsel, the court did not permit Detective Friedrich to testify to Battle's statements that explicitly exonerated defendant of any complicity in the crimes. In those statements, Battle stated that defendant had accompanied him to the victim's motel room but had remained outside when Battle entered to buy the drugs. Defendant only entered the room after the altercation between Battle and the victim had begun. Battle explained: "He's [defendant] trying to break up the situation. He's not like jumping in, you know, jump on, try and hurt him [the victim] or anything like that. He's trying pull me and him apart." Defendant did not hit the victim. After defendant pulled him away, Battle grabbed the victim's keys and left the room with defendant. Defendant walked behind Battle to the victim's car but did not enter the car or take any property from it.

The court found the statements in the preceding paragraph did not come within the declaration against interest exception to the hearsay rule. It explained: "Mr. Battle is saying what he did. That is against his interest. That comes in. Saying what Mr. Rowland [defendant] did, that is -- that would not be against Mr. Battle's interest." The trial court's exclusion of these statements is the basis of defendant's primary appellate contention.

After Detective Friedrich testified, defendant took the stand. He testified he met Battle for the first time on August 20. He asked Battle where he could purchase marijuana. Battle took him to the motel where they met the victim

outside of his room. Battle and the victim spoke and then entered the room. Defendant did not go into the room. After hearing a scream, defendant went to the room and saw Battle and the victim struggling. He grabbed Battle to stop the fight and Battle dropped a rock. The victim was bleeding from his head. Battle grabbed something from the victim's room and went to a car. Defendant and Battle soon parted company but, after running into each other several hours later, were arrested. Defendant never struck the victim or took property from the victim's room or car.

The Prosecution's Rebuttal

In rebuttal, the prosecution, over defense objection, introduced statements Battle had made to the court when he had pled nolo contendere to robbery.² The statements were introduced for the limited purpose of impeaching Battle's hearsay statements that the defense had offered earlier. In the impeaching statements, Battle claimed that he and defendant went to the victim's motel room; that when the victim opened the door, defendant rushed inside and hit the victim in the head with a rock; and that he (Battle) did *not* enter either the victim's room or the victim's car.

Immediately before the impeaching statements were introduced, the court properly instructed the jury: "Ladies and gentlemen, there is some statements made by Mr. Michael Battle who you heard spoke of. . . . [T]his evidence is being admitted or will be admitted for the limited purpose for assisting you as the jury for

² The court did not tell the jury that the statements were made at a hearing in which Battle had entered a plea.

assessing the credibility of Mr. Battle, not for the truth of the matter as stated. And it's for that purpose you are to consider the evidence being presented.”³

Defense Closing Argument

The defense theory of the case, supported by defendant's trial testimony, was that defendant did not commit any crime. Defense counsel argued that Battle's statements to Detective Friedrich that he committed the crimes were credible and that those statements were sufficient to create a reasonable doubt as to defendant's guilt. In addition, counsel argued the victim's identification of defendant as the man who hit him with the rock was neither “clear cut” nor “consistent.”

The Jury's Verdicts

The jury convicted defendant of all crimes charged: robbery, assault, burglary of the motel room, and auto burglary. However, the jury apparently

³ Section 1202 governs impeachment of a hearsay declarant through use of inconsistent statements. It provides, in relevant part: “Evidence of a statement . . . by a declarant that is inconsistent with a statement by such declarant received in evidence as hearsay evidence is not inadmissible for the purpose of attacking the credibility of the declarant though he is not given and has not had an opportunity to explain or deny such inconsistent statement.”

The Law Revision Commission Comment to section 1202 explains: “Section 1235 provides that evidence of inconsistent statements made by a trial witness may be admitted to prove the truth of the matter stated. No similar exception to the hearsay rule is applicable to a hearsay declarant's inconsistent statements that are admitted under Section 1202. Hence, the hearsay rule prohibits any such statement from being used to prove the truth of the matter stated. If the declarant is not a witness and is not subject to cross-examination upon the subject matter of his statements, there is no sufficient guarantee of the trustworthiness of the statements he has made out of court to warrant their reception as substantive evidence unless they fall within some recognized exception to the hearsay rule.”

believed there was a reasonable doubt about the victim's identification of defendant as his assailant. It found "not true" the allegations defendant either personally used a deadly and dangerous weapon or personally inflicted great bodily injury upon the victim during the commission of the robbery or burglary. (Pen. Code, §§ 12022, subd. (b)(1) and 12022.7, subd. (a).)

DISCUSSION

Defendant contends: "Battle's statements that exculpated [defendant] should have been admitted in order to assure a fair trial." We agree.

Section 1230 provides, in pertinent part: "Evidence of a statement by a declarant having sufficient knowledge of the subject is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and the statement, when made, . . . so far subjected him to the risk of . . . criminal liability, . . . that a reasonable man in his position would not have made the statement unless he believed it to be true."

To determine whether a statement qualifies as against the declarant's penal interest, an objective test is used. The test is "would the statement subject its declarant to criminal liability such that a reasonable person would not have made the statement without believing it true. [Citations.]" (*People v. Jackson* (1991) 235 Cal.App.3d 1670, 1678, fn. omitted.) "The focus of the declaration against interest exception to the hearsay rule is the basic trustworthiness of the declaration. [Citations.] In determining whether a statement is truly against interest within the meaning of Evidence Code section 1230, and hence is sufficiently trustworthy to be admissible, the court may take into account not just the words but the circumstances under which they were uttered, the possible motivation of the declarant, and the declarant's relationship to the defendant. [Citations.]" (*People v. Frierson* (1991) 53 Cal.3d 730, 745.) The trial court's ruling about the

applicability of this hearsay exception is reviewed for abuse of discretion. (*People v. Lawley* (2002) 27 Cal.4th 102, 153.)

In this case, Battle, throughout his interview with Detective Friedrich, continually stated that defendant had no involvement with the crimes.⁴ The detective did not believe Battle. After telling Battle that the victim had said that Battle was not the person who had struck him, the detective persistently questioned Battle about defendant's involvement in the assault. The detective expressed skepticism about Battle's replies because the victim had been seriously injured but Battle denied having hit the victim with any object that could have caused those injuries. In this context in which the detective's clear intent was to elicit statements incriminating defendant, Battle's repeated statements that defendant did not hit the victim but instead tried to separate Battle and the victim were against Battle's penal interests. Because Battle refused to shift any blame to defendant and because there was no suggestion anyone else had caused the injuries, there is a reasonable inference that Battle lied when he claimed he had not caused the injuries and that defendant had not participated in the assault. Battle, by exonerating defendant, further incriminated himself.

Battle did not attempt to shift blame for *any* crime to defendant but instead conceded he was the *only* participant. Hence, this was "not a case in which [the declarant] admitted to some culpability in order to shift the bulk of the blame to another." (*People v. Brown* (2003) 31 Cal.4th 518, 537.) These statements, made shortly after the crimes were committed, would undermine the credibility of any argument to be made by Battle either at trial that defendant initiated the crimes and he (Battle) had no knowledge of defendant's criminal purpose *or at sentencing* that he (Battle) was a passive participant induced by defendant to commit the crimes.

⁴ A transcript of the entire interview is included in the record on appeal.

(See, e.g., Rule 4.414(a)(6), Cal. Rules of Ct. [one criteria affecting decision to grant or deny probation is whether the defendant was an active or passive participant]; and Rule 4.423(a)(1) and (6), Cal. Rules of Ct. [circumstances in mitigation include fact the defendant was a passive participant who played a minor role in the crime and that the defendant had no apparent predisposition to commit the crime but was induced by others to participate].) As came out during rebuttal, Battle did seek to diminish his participation at sentencing in aid of more lenient treatment. The statements were therefore against Battle's penal interests.

In sum, the trial court abused its discretion in precluding testimony about Battle's statements explaining defendant's non-involvement in the crimes. The Attorney General's contrary arguments are not persuasive.

The Attorney General first quotes the principle found in *People v. Duarte* (2000) 24 Cal.4th 603 that “the hearsay exception should not apply to collateral assertions within declarations against penal interest.” (*Id.* at p. 612, quoting *People v. Campa* (1984) 36 Cal.3d 870, 882.) A complete and contextual reading of *People v. Campa, supra*, demonstrates the inapplicability of that principle to this case. There, the court explained: “[W]e have recognized that the trustworthiness of such declarations [against interest] is limited and that the hearsay exception should not apply to collateral assertions within declarations against interest. [Citation.] In light of the high probability of unreliability which characterizes such ‘collateral assertions’ [citation], we have construed the hearsay exception ‘to be inapplicable to evidence of any statement or portion of a statement not itself specifically dis-serving to the interests of the declarant.’ [Citation.]” (*People v. Campa, supra*, 36 Cal.3d at pp. 882-883.) As we explained above, Battle's statements about defendant's non-involvement in any of the crimes were against Battle's penal interests, e.g., specifically dis-serving to his interests. They were therefore reliable and trustworthy and should not have been redacted from the detective's testimony about his interview with Battle.

In a similar vein, we reject the Attorney General's reliance upon *In re Juan G.* (2003) 112 Cal.App.4th 1. There, the appellant offered into evidence an accomplice's post-arrest statement to the police in which the accomplice admitted committing the robbery with which the two of them were charged. However, the court deleted from the accomplice's statement the following phrase: "My friend had nothing to do with the robbing[.]" The appellant, whom the parties and the court assumed was the referenced friend, urged the phrase should have been admitted under the declaration against penal interest exception. In a footnote, the appellate court summarily rejected the contention. It wrote: "Only those portions of [the accomplice's] statements which are specifically disserving to his penal interests are admissible. [Citation.] The statement concerning appellant does not inculcate [the accomplice] but is merely a collateral assertion to which the exception does not apply. [Citations.]" (*Id.* at p. 6, fn. 13.)

This conclusion of the *Juan G.* court is not inconsistent with our analysis. Although difficult to discern from the court's summary treatment of the issue, there apparently was no reason to believe that it was against the accomplice's interest to exculpate the appellant at the time of his interview with the police. Here, on the other hand, the specific facts of this case establish Battle's statements exonerating defendant of any criminal involvement were also against Battle's penal interests and therefore not collateral assertions outside of the ambit of the hearsay exception.

Because the trial court abused its discretion in precluding admission of Battle's statements exonerating defendant of any criminal involvement, we must next determine whether that ruling was prejudicial. *People v. Watson* (1956) 46 Cal.2d 818, 836 sets forth the proper standard of review. (See, e.g., *People v. Fudge* (1994) 7 Cal.4th 1075, 1102-1104.) The question is whether it is reasonably probable a result more favorable to defendant would have occurred in absence of the error. We answer that question in the affirmative.

While Battle's statements introduced at trial directly implicated Battle, the statements did not explicitly address defendant's involvement or lack of involvement in the crimes. As such, they did not directly support the defense theory that defendant was not a participant. Nor did the statements exclude the possibility defendant was an accomplice. The redacted statements, however, explicitly exonerated defendant of any criminal culpability and corroborated appellant's testimony. Those statements were the heart of the defense. Since evidence of third party (here, Battle's) culpability requires the jury to return a "not guilty" verdict if the evidence creates a reasonable doubt as to the defendant's guilt (see *People v. Jackson*, *supra*, 235 Cal.App.3d at p. 1677), we conclude it is reasonably probable a different verdict would have been reached had the redacted statements been introduced at trial.

The Attorney General's argument against this conclusion is that the victim's identification of defendant was so reliable that it is not reasonably probable the disallowed evidence would have altered the jury's conclusion. We disagree. Defendant's presence at the motel when the crimes were committed was not contested. The issues were whether *he* struck the victim, and if not, whether he was still liable as an accomplice.⁵ The jury's "not true" findings in regard to the allegations of personal use of a weapon and personal infliction of great bodily injury suggest the jury had serious questions about the victim's identification of defendant as his assailant. The jury may well have believed that Battle was the assailant and defendant only an accomplice. The redacted portions of Battle's statements could have raised a reasonable doubt as to defendant's participation even as an accomplice.

⁵ The pattern instructions on aiding and abetting were submitted to the jury.

In a nutshell, the court's ruling disallowing Battle's statements exonerating defendant was an abuse of discretion resulting in a miscarriage of justice. Retrial is required.

Our conclusion requires us to address only one of defendant's other appellate contentions.⁶ In a supplemental brief, he cites *Crawford v. Washington* (2004) 124 S.Ct. 1354 to argue that permitting the prosecution to introduce Battle's statements from his plea hearing violated the confrontation clause. Not so. The *Crawford* court specifically noted that the confrontation clause "does not bar the use of testimonial statements *for purposes other than establishing the truth of the matter asserted*." (*Id.* at p. 1369, fn. 9; italics added.) In this case, the prosecutor introduced the statements pursuant to section 1202 only to impeach Battle, the hearsay declarant. The court properly instructed the jury about the limited purpose of this evidence. (See fn. 3, *supra*.) No violation of the confrontation clause occurred.

DISPOSITION

The judgment is reversed.

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⁶ The contentions we do not address are: (1) due process mandates that defendant be allowed to introduce all of Battle's statements; (2) trial counsel was ineffective for failing to move to introduce the redacted statements in surrebuttal after the prosecution had impeached Battle with statements made at the time of his plea; and (3) a portion of defendant's sentence violates Penal Code section 654.

HASTINGS, J.

We concur:

EPSTEIN, Acting P.J.

CURRY, J.